

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 26, 2003

IN RE:

COMPLAINT OF US LEC OF TENNESSEE, INC.
AGAINST ELECTRIC POWER BOARD OF
CHATTANOOGA

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Docket No. 02-00562

ORDER ON THE MOTION FOR SUMMARY JUDGMENT OF
THE ELECTRIC POWER BOARD OF CHATTANOOGA

This matter came before a Hearing Officer of the Tennessee Regulatory Authority ("Authority" or "TRA") on the *Supplemental Memorandum in Support of Motion for Summary Judgment* filed by the Electric Power Board of Chattanooga ("EPB") and the response thereto filed by US LEC of Tennessee, Inc. (US LEC).

Background

On May 15, 2002, US LEC of Tennessee, Inc. ("US LEC") filed a *Complaint* against EPB. The *Complaint* asserts that US LEC is a competing local exchange carrier authorized to operate throughout the service area of BellSouth Telecommunications, Inc. in Tennessee, including Chattanooga.¹ According to the *Complaint*, EPB operates as a board of the City of Chattanooga, providing retail electric service to business and residential customers in the City of Chattanooga, most of Hamilton County, and parts of eight other counties located in Tennessee and Georgia² and offering telecommunications services in Chattanooga, under the name "EPB Telecommunications," in competition

¹ *Complaint* (May 15, 2002) p. 1.

² *Id.*, pp. 1-2.

with US LEC and other local exchange carriers.³ EPB was granted its certificate of public convenience and necessity ("CCN") to provide telecommunications services in 1999.

The *Complaint* alleges that the electric division of EPB is discriminating in favor of or providing benefits or cross-subsidies to the telecommunications division of EPB in violation of a "Code of Conduct" that was incorporated by reference in the Order granting the telecommunication division's CCN.⁴ US LEC maintains that under the Code of Conduct: (1) "EPB may not discriminate between the telecommunications division"⁵ and other telecommunications providers; (2) the electric and telecommunications divisions of EPB may engage in a limited amount of joint marketing "provided that the customer is informed . . . of the separate identities of each;"⁶ and (3) internal auditors at EPB are required to test "the compliance of the telecommunications division and the electric system" with the Code of Conduct and the other Proposed Conditions and to "issue a statement detailing the EPB's compliance with the Code of Conduct."⁷

The allegations of discriminatory and anti-competitive practices asserted in US LEC's *Complaint* can be broken down into three claims against EPB: (1) through the use of the name "EPB" and joint marketing activities EPB's telecommunications division receives a benefit from the good will created and maintained by the electric division; (2)

³ *Id.*, pp. 3-4.

⁴ The "Code of Conduct" is included in the *Second Revised Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance Filed on Behalf of the Tennessee Cable Telecommunications Association and Electric Power Board of Chattanooga* at p. 14 (cited in full at note 5).

⁵ *Application of Electric Power Board of Chattanooga for a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services*, Docket No. 97-07488, *Second Revised Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance Filed on Behalf of the Tennessee Cable Telecommunications Association and Electric Power Board of Chattanooga*, p. 17 (Nov. 3, 1998) (hereinafter *Proposed Conditions*).

⁶ *Id.*, p. 16.

⁷ *Id.* p. 19; see *Complaint* (May 15, 2002) pp. 2-3.

the electric division of EPB allows the telecommunications division to gain access to buildings by using the rights of way and building entrance facilities that are available to the electric division and not available to other telecommunications service providers; and (3) EPB telecommunications failed to file with the TRA internal audit reports required by the Code of Conduct.

On May 23, 2002, BellSouth Telecommunications, Inc. ("BellSouth") moved to intervene in this docket.

On June 10, 2002, EPB filed a *Motion to Dismiss*, requesting that the Authority either decline to convene a contested case or, alternatively, dismiss the *Complaint*. Regarding US LEC's allegation that third party carriers have been denied access to EPB rights-of-way, EPB contended that it could not have denied third party carriers access to its rights-of-way because it received no requests for such access.⁸ In support, EPB filed the Affidavits of Harold E. Depriest and Stephen W. Lawrence, who attested that EPB had received no requests for access to its underground facilities since the telecommunications division received its CCN. In its *Motion to Dismiss*, EPB also argued that because EPB Telecommunications is a part of the same legal entity as EPB's electrical division, EPB is an appropriate name for the telecommunications division provided for by the organizational structure set forth in Tenn. Code Ann. 7-52-401.⁹ Finally, with regard to US LEC's allegation that EPB failed to provide certain statements from its internal auditors concerning compliance with the *Order*, EPB asserted that its

⁸ *Id.*, p. 3.

⁹ *Motion to Dismiss* (June 10, 2002). p. 2.

internal auditors have issued internal audit reports, but that EPB is not required to automatically file those reports with the Authority.¹⁰

At a regularly scheduled Authority Conference held on June 11, 2002, the Directors appointed the General Counsel or his designee as Hearing Officer to (1) make findings of fact and conclusions of law, as necessary; (2) determine whether to open a contested case; and (3) if a contested case is opened, render an initial decision on the merits of the *Complaint*.¹¹

On June 18, 2002, US LEC filed a *Response to Motion to Dismiss* ("Response"). US LEC stated that EPB "intentionally presents its electric and telephone operations as intertwined" which violates the Code of Conduct and the statutory prohibition against cross-subsidization by giving EPB's telecommunications division the free use of the good will and reputation of EPB.¹² US LEC further argued that EPB's failure to file internal audit reports with the Authority constitutes a violation of the Order issued in granting the CCN.¹³

On September 4, 2002, the Hearing Officer convened a Pre-Hearing Conference, during which the parties presented oral argument on the *Motion to Dismiss*. Counsel for EPB contended that because it submitted affidavits in support of its *Motion to Dismiss*, that motion was converted to a motion for summary judgment.¹⁴ Counsel further contended that no genuine issue of material fact existed and, therefore, summary judgment should be granted in favor of EPB.¹⁵ Counsel for US LEC countered that a

¹⁰ *Id.*, p. 3.

¹¹ Transcript of Authority Conference (June 11, 2002) pp. 32-33.

¹² *Response* (June 18, 2002) p. 2.

¹³ *Complaint* (May 15, 2002) p. 4.

¹⁴ Transcript of Proceedings (Sept. 4, 2002) pp. 3-4.

¹⁵ *Id.*, p. 4.

motion for summary judgment would be proper only after the parties had an opportunity to conduct discovery.¹⁶

On September 12, 2002, the Hearing Officer denied EPB's *Motion to Dismiss*, finding that the allegations in the *Complaint*, construed, as required, in the light most favorable to the nonmovant, stated a claim upon which relief could be granted. Reasoning that the operative issues were whether to dismiss the *Complaint* or convene a contested case, the Hearing Officer concluded that the motion for summary judgment was premature and held EPB's motion for summary judgment in abeyance to be renewed and, if desired, supplemented at the appropriate time. The Hearing Officer then convened a contested case and entered an order granting BellSouth's *Petition for Leave to Intervene*. Thereafter, the parties conducted discovery.

On September 20, 2002, US LEC filed an Amendment to its *Complaint*, adding a fourth cause of action. The Amendment alleges that EPB refused to interconnect with US LEC and failed to provide US LEC with features and services on a non-discriminatory, unbundled basis in violation of Tenn. Code Ann. § 65-4-124(a) by rejecting US LEC's request for access to EPB's building and fiber network in Chattanooga.

On February 13, 2003, EPB filed a *Supplemental Memorandum in Support of Motion for Summary Judgment* and a *Statement of Undisputed Material Facts*. EPB argues that no genuine issues of material fact remain to be tried and it is entitled to judgment as a matter of law. Specifically, EPB contends that because its CCN was granted under the name "Electric Power Board of Chattanooga" nearly four years ago and

¹⁶ *Id.*, p. 16.

the certificate, the Order granting the CCN and the attachments thereto refer to the "Telecommunications Division of EPB," its use of the name EPB Telecommunications is proper.

EPB denies that it violated its Code of Conduct by failing to keep separate the identities of its telecommunications and electric divisions. EPB argues that the "separate identities" requirement in the Code of Conduct applies only to EPB's joint marketing of electric and telecommunications services. EPB observes that US LEC failed to allege any such joint marketing.

EPB also disputes that it denied any competing local exchange carrier ("CLEC") access to its underground facilities. In support, EPB cites the affidavit of Stephen Lawrence, which states that EPB received no third party requests for access to its underground facilities since its CCN was granted. EPB further asserts that its telecommunications division obtained its own building access arrangements. Relying on the affidavit of William E. Chapman, Jr., EPB maintains that it has paid to install fiber in conduit that it rents from the electric division and negotiates its own building access arrangements.

EPB argues that the Code of Conduct did not require it to file its internal audit reports with the Authority. EPB maintains that its audit reports are available to the Authority upon request.

Finally, EPB addresses the allegations raised in the Amendment to the *Complaint*, that EPB refused to interconnect with and lease space on its transmission facilities to US LEC in violation of Tenn. Code Ann. § 65-4-124(a). EPB maintains that US LEC's claim is preempted by 47 U.S.C. § 251, which requires incumbent local exchange carriers

("ILECs") to provide unbundled network elements. EPB argues that because it is a CLEC and not an ILEC, this requirement does not extend to it. EPB also contends that Tenn. Code Ann. § 65-4-124(a) does not require CLECs to provide unbundled services to other CLECs. EPB also asserts that Tenn. Code Ann. § 65-4-124(a) applies only to the extent compliance is financially feasible and the undisputed evidence presented by US LEC shows that it is not financially feasible for EPB to offer the requested services.

US LEC filed its *Response to Motion for Summary Judgment* on February 19, 2003, arguing that it has raised legal and policy questions about EPB's operations of sufficient gravity to require commencement of a contested case hearing. According to US LEC, the most serious allegation is that EPB is using its electric operations to cross-subsidize the telecommunications division. In support of the cross-subsidization allegation, US LEC presents, *inter alia*, evidence of a print advertisement of an electrical outlet conversing with itself. The top outlet states, "Hear the one about the power company that got into the phone biz?" The bottom outlet responds, "Yeah. At first people were shocked. Then they couldn't stop talking." US LEC also points to language on EPB's website which states, "Everything we've learned over the years about keeping the lights on . . . has been put to good use in our telecommunications delivery. So you can be sure your phone service will be as reliable as your power service." US LEC points out that the Code of Conduct permits joint marketing, but only if customers are informed that EPB's electric and telecommunications divisions are separate entities. US LEC argues that EPB has repeatedly violated this requirement. US LEC also contends that the Code of Conduct must be strengthened to prohibit EPB's telecommunication division from leveraging the good will and reputation of the electric division, which amounts to

subsidization in violation of Tenn. Code Ann. § 7-52-402.

US LEC argues the summary judgment is inappropriate on its claim that EPB electric discriminates in favor of the telecommunication division with regard to building access facilities because the evidence presented in EPB's *Supplemental Response to Discovery* does not clearly show that EPB is not using the facilities of the electric division to gain access to "building entrance facilities." According to US LEC, instead, the affidavit of Williams Chapman states that in every instance where the telecommunications division has gained access to such buildings, it has obtained the building owner's permission and has paid the electric division to install fiber conduit to gain access to buildings.

US LEC further argues that EPB violated the Authority's May 10, 1999 *Order Approving Application of Public Convenience and Necessity* by failing to file audit reports with the TRA. US LEC asserts that the May 10, 1999 *Order* plainly states that "EPB will provide the results of any such audits to the Authority." US LEC suggests that sanctions pursuant to Tenn. Code Ann. § 65-4-120 for violating an order of the Authority are appropriate.

Finally, as to EPB's argument that its refusal to interconnect with and lease space on its transmission facilities to US LEC did not violate Tenn. Code Ann. § 65-4-124(a), US LEC counters that 47 U.S.C. § 251 does not preempt Tenn. Code Ann. § 65-4-124(a) because the federal statute applies only to ILECs and does not address CLECs. US LEC further maintains that EPB has not satisfied its burden of showing that interconnection is not feasible.

Findings of Fact and Conclusions of Law

The procedural standards governing review of motions for summary judgment are well settled.¹⁷ Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate when: (1) no genuine issues with regard to the material facts relevant to the claim or defense contained in the motion remain to be tried and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts.¹⁸ The moving party bears the burden of proving that its motion satisfies these requirements.¹⁹ To properly support its motion, the moving party must either affirmatively negate an essential element of the nonmovant's claim or conclusively establish an affirmative defense.²⁰

After a properly supported motion for summary judgment is asserted, the burden shifts to the nonmovant to respond with evidence establishing the existence of specific, disputed, material facts which must be resolved by the trier of fact.²¹ Thus, if the moving party successfully negates a claimed basis for the action, the nonmovant may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim. If the moving party fails to negate a claim, the nonmovant's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail.²²

The standards governing the assessment of evidence in the summary judgment context are also well established. The evidence must be viewed in the light most

¹⁷ See Tenn. R. Civ. P. 56; *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997).

¹⁸ See *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Anderson v. Standard Register Co.*, 857 S.W.2d 555, 559 (Tenn. 1993).

¹⁹ See *Downen v. Allstate Ins. Co.*, 811 S.W.2d 523, 524 (Tenn. 1991).

²⁰ See *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998); *Robinson v. Omer*, 952 S.W.2d 423, 426 (Tenn. 1997).

²¹ See *Byrd v. Hall*, 847 S.W.2d at 215.

²² See *McCarley v. West Quality Food Serv.*, 960 S.W.2d at 588; *Robinson v. Omer*, 952 S.W.2d at 426.

favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor.²³ Summary judgment is appropriate only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion.²⁴

Cross Subsidization Through Use of the Name "EPB" and Joint Marketing

The Pre-Hearing Officer turns to US LEC's claim that through the use of the name "EPB," EPB's telecommunications division receives a benefit from the good will created and maintained by the electric division in violation of Tenn. Code Ann. § 7-52-402. In its *Complaint* and its *Response to the Motion for Summary Judgment*, US LEC supports this allegation with public statements emanating from EPB which may blur the separateness of the telecommunications and the electric divisions of EPB.

Tenn. Code Ann. § 7-52-402 states in pertinent part:

A municipality providing any of the services authorized by § 7-52-401 [which authorizes municipalities operating electric plants to, *inter alia*, provide telecommunications services] shall not provide subsidies for such services. Notwithstanding the limitations set forth in the preceding sentence, a municipality providing such services shall be authorized to:

(1) Dedicate a reasonable portion of the electric plant to the provision of such services, the costs of which shall be allocated to such services for regulatory purposes; . . .

In light of Tenn. Code Ann. § 7-52-402's prohibition against subsidies, for the purposes of resolving EPB's *Motion*, it must be determined whether US LEC has raised disputed issues of material fact with regard to allegations that EPB's electric division is cross-subsidizing its telecommunication division by publicizing their affiliation.

²³ See *Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11.

²⁴ See *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

“Cross-subsidization may take a variety of forms.” Perhaps the most common approach is for the price-regulated firm to invest in an activity (e.g., research and development) that is necessary for its regulated business, but which also contributes to a good or service to be sold in unregulated markets. By allocating the joint costs disproportionately to the regulated side of the business and passing them on to ratepayers, the firm obtains a cost advantage in the unregulated market, which it can exploit either by reaping supra-competitive profits or by engaging in [anti-competitive activity]. . . .²⁵

Not charging the regulated division of a business for joint activity, such as joint marketing, may also constitute cross-subsidization by giving the regulated entity a competitive advantage over its competitors or by unrealistically increasing the profits of the parent company.²⁶

Insofar as US LEC alleges that mere use of the name EPB, without more, constitutes a subsidy, US LEC has presented no legal or evidentiary support for its claim. The record shows that EPB applied for its CCN under that name and has been using it since 1998. Absent some evidentiary showing of a tangible benefit accruing solely from the use, for identification purposes, of a name reflecting an approved and accurate affiliation, it cannot be said that such use constituted a subsidy in violation of Tenn. Code Ann. § 7-52-402. Accordingly, summary judgment is appropriate on the claim related to the use of the appellation “EPB.”

US LEC’s allegation that the joint marketing of EPB’s telecommunications and electric divisions constitutes a subsidy and violates the Code of Conduct to which EPB agreed to conform raises questions that require further examination. In its defense, EPB

²⁵ *U.S. v. Western Elec. Co.*, 12 F.3d 225, 235 (D.C. Cir. 1993) (quoting *United States v. Western Elec. Co.*, 592 F. Supp. 846, 853 (D.C. Cir. 1984)).

²⁶ See *Computer and Communications Industry Ass’n v. F.C.C.*, 693 F.2d 198, 205, n. 25 (D.C. Cir. 1982), cert. denied sub nom., 461 U.S. 938 (1983).

counters that it has not engaged in joint marketing in violation of the Code of Conduct.²⁷ In its *Response to Motion for Summary Judgment*, US LEC presents evidence, from advertising and the EPB webpage, giving the impression that EPB's telecommunications and electric divisions are the same entity.²⁸ EPB did not respond to this evidence and failed to address the cross-subsidization issue in the context of this marketing activity. Thus, genuine issues of material fact remain to be tried regarding whether such marketing activity constitutes a subsidy and/or violates the Code of Conduct to which EPB agreed to conform.

Discrimination and Cross-Subsidization with Regard to Access to Facilities

US LEC alleges that the electric division of EPB allows the telecommunications division to gain access to buildings by using rights of way and building entrance facilities that are available to the electric division and not available to telecommunications service providers.

In response, EPB relies upon the affidavit of Stephen Lawrence, attesting that no requests for access from CLECs have been received. EPB also relies upon the affidavit

²⁷ The Code of Conduct states in pertinent part:

Joint Marketing of Regulated and Nonregulated Services - The electric system and the telecommunications division of the Electric Power Board of Chattanooga may jointly offer their respective products and services to customers provided that the customer is informed (a) of the separate identities of each and (b) that the products and services of the electric utility system are distinct and separately priced from the offerings of the telephone division and the customer may select one without the other.

²⁸ In addition to the above described statement by the electrical outlet, US LEC's *Response to Summary Judgment* includes a quote from the EPB Telecom website which states:

When it comes to providing reliable service, EPB is one of the leading utilities in the country. And EPB Telecommunications is no different. Everything we've learned throughout the years about keeping the lights on – including redundant outage prevention systems, automated restoration systems and maintaining a crack lineman crew – has been put to good use in our telecommunications delivery. So you can be sure your phone service will be as reliable as your power service. And that's saying something.

of William Chapman, EPB's Senior Vice-President-Telecommunications, which states that (1) he has "the responsibility of negotiating or supervising the negotiations of access to office building [sic] in order to service customers who are tenants of such office building;" (2) "[i]n every instance in which the Telecommunications Division has gained access to such buildings, the Telecommunications Division has obtained prior permission to access the building before having any lines or facilities installed in the building;" and (3) "[a]fter obtaining this permission the Telecommunications Division has paid EPB to install fiber conduit that the Telecommunications Division rents from EPB."²⁹ Further, in its *Supplemental Response to Discovery Request of US LEC*, EPB states: (1) "EPB does not give any CLEC, including EPB Telecommunications, the right to use its electric building entrance facilities;"³⁰ and (2) after receiving a CLEC request for access to its underground conduit, "EPB offered to make available conduit access at the present rate of \$2.77 per foot per year for the year 2002 and with the requirement that the CLEC use qualified workers to work in the EPB power space."

Taken together, this evidence raises genuine issues of material fact with regard to the access EPB provides to its building entrance facilities. The apparent contradiction between EPB's statements that it does not give any CLEC, including its own telecommunication division, the right to use its electric system building entrance facilities and its admission that it rents access to conduit precludes summary judgment on this issue. At best, the record is unresolved on EPB's use of the term "building entrance facilities."

²⁹ *Affidavit of William E. Chapman, Jr.* (Aug. 28, 2002) p. 1.

³⁰ *Supplemental Response to Discovery Request of US LEC* (Dec. 30, 2002) p. 4.

Audit Reports

US LEC's third allegation asserts that EPB telecommunications failed to file its internal audit reports with the TRA. US LEC argues that EPB's failure to file its reports contravenes the Authority's May 10, 1999 *Order Approving Application for Certificate of Public Convenience and Necessity*, thereby warranting the imposition of penalties pursuant to Tenn. Code Ann. § 65-4-120.

EPB responds that it is not required to automatically file internal audit reports with the Authority, but the reports are available upon request. EPB asserts that it has submitted audit reports for fiscal years 2000 and 2001 in response to US LEC's discovery requests and filed its audit report for 2002 in response to a request from the Authority in Docket No. 97-07488.

Standing is a threshold issue that focuses on whether a claimant has a sufficiently personal stake in the outcome of a controversy to warrant the exercise of the forum's power on its behalf.³¹ The party, rather than the merit of the case, is the major focus in determining standing.³² To establish standing, a party must demonstrate that (1) it sustained a distinct and palpable injury; (2) the injury was caused by the challenged conduct; and (3) the injury may be redressed by a remedy the forum is authorized to provide.³³ The party invoking the forum's jurisdiction bears the burden of establishing these elements.³⁴ When the claimed injury involves the violation of a statute, the adjudicator must determine whether the "statutory provision on which the claim rests

³¹ See *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 842 S.W.2d 611, 615 (Tenn. Ct. App. 1992); *Adarand Constructors v. Mineta*, 534 U.S. 103, 107, 122 S.Ct. 511, 513, 151 L.Ed.2d 489 (2000) (standing may be raised *sua sponte*); *Citizens for a Better Environment v. Steel Co.*, 523 U.S. 83, 87, 118 S.Ct. 1003, 1010, 140 L.Ed.2d 210 (1998) (same).

³² See *id.*

³³ See *id.*

³⁴ See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 608, 107 L.Ed.2d 603 (1990).

properly can be understood as granting persons in the plaintiff's position a right to judicial relief."³⁵

US LEC alleges no distinct and palpable injury arising from EPB's failure to file the internal audit reports. Nor does Tenn. Code Ann. § 65-4-120 contemplate a private right of action enforceable by entities other than the Authority. Accordingly, US LEC lacks standing to propound its claim that EPB failed to file its internal audit reports.

That said, it should be noted that the "Code of Conduct," included in the *Proposed Conditions to Certificate of Public Convenience and Necessity to Ensure Statutory Compliance Filed on Behalf of the Tennessee Cable Telecommunications Association and Electric Power Board of Chattanooga* states:

The EPB maintains an internal audit staff, which will be tasked annually with testing the compliance of the telecommunications division and the electric system with the Conditions set forth herein or supplemental conditions or provisions ordered by the TRA. Any written finding or work papers associated with such compliance tests shall be made available to the TRA.

Annually, the internal auditors for the EPB shall issue a statement detailing the EPB's compliance with the Code of Conduct.³⁶

The *Order Approving Application for Certificate of Public Convenience and Necessity* recapitulates the above quoted language by stating, "Provisions for internal and independent audits are also addressed in the proposed conditions and EPB will provide the results of any such audits to the Authority."³⁷ This language establishes that EPB is

³⁵ *Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975); *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970) (The plaintiff's complaint must fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."); *Chattanooga Ry. & Light Co. v. Bettis*, 139 Tenn. 332, 337, 202 S.W. 70, 71-72 (1917).

³⁶ *Proposed Conditions*, p. 19.

³⁷ *Order Approving Application for Certificate of Public Convenience and Necessity*, Docket No. 97-07488 (May 10, 1999), p. 5, n. 2.

required to file its internal audit reports annually with the TRA. EPB is ordered to continue filing its internal audit reports with the TRA annually no later than thirty days after completion.

Violation of Tenn. Code Ann. § 65-4-124 for Refusing to Interconnect

In its Amendment to the *Complaint*, US LEC alleges that EPB refused to interconnect with and lease space on its transmission facilities in violation of Tenn. Code Ann. § 65-4-124(a). EPB responds, *inter alia*, that (1) this claim is preempted by 47 U.S.C. § 251, which limits its mandate to provide unbundled services to ILECs only; and (4) 47 C.F.R. § 51.223 requires States to obtain the approval of the Federal Communications Commission (“FCC”) before imposing the obligations of section 251 on CLECs like EPB and such approval has not been sought.

These arguments touch on matters, particularly on the availability of unbundled network elements, that presumably will be addressed in some form in the FCC’s Triennial Review Order (“TRO”), the issuance of which is imminent. Any analysis of the application, interaction, limitations and preemptive effect of 47 U.S.C. § 251(c) and (d) and 47 C.R.F. §51.223 without reference to the TRO runs the risk of being incomplete or superceded. Accordingly, the issue of whether EPB violated Tenn. Code Ann. § 65-4-124 by refusing to interconnect with US LEC will be held in abeyance pending the issuance of the TRO.

Metronet, Inc.

In its *Response to Motion for Summary Judgment*, US LEC states that in responding to discovery requests, EPB acknowledged that “Metronet, Inc. is a hybrid entity that uses ‘the authorization of EPB to provide Internet service’ and is ‘designed to

be an economic development arm of the City of Chattanooga.”³⁸ US LEC alleges that “it appears that Metronet now intends to offer regulated, telecommunications services both to ISPs and to end-users in the Chattanooga area,” thereby constituting cross-subsidization.³⁹ EPB has not responded to this allegation.

The rules governing practice before the Authority contemplate that allegations will be raised in complaints or petitions.⁴⁰ Such complaints must “set forth with specificity the factual basis and legal grounds upon which the complaint is based.”⁴¹ This procedure establishes an organized and predictable structure for addressing and responding to allegations.⁴² When facts arise that may warrant adding a claim to an existing docket, claimants may amend their complaints, as did US LEC in this case in raising its claim that EPB refused a request to interconnect. No proper amendment raising the Metronet claim has been presented to this forum. Thus, US LEC’s allegations against Metronet are not properly before the Hearing Officer.⁴³

IT IS THEREFORE ORDERED THAT:

1. Summary judgment is granted on US LEC’s claim that the use of the name EPB Telecommunication Division constitutes illegal cross-subsidization.
2. Summary judgment is denied as to US LEC’s allegations regarding joint marketing of EPB’s electric and telecommunications divisions.

³⁸ *Response to Motion for Summary Judgment* (Feb. 19, 2003) p. 8 (quoting EPB’s *Supplemental Response to US LEC Request*, No. 19).

³⁹ *Id.*

⁴⁰ See Tenn. Comp. R. & Reg. 1220-1-2-.09; see also Tenn. Comp. R. & Reg. 1220-1-2-.02; Tenn. Comp. R. & Reg. 1220-1-2-.03.

⁴¹ Tenn. Comp. R. & Reg. 1220-1-2-.09(1)(c).

⁴² Consistent with Tenn. Comp. R. & Reg. 1220-1-2-.06(3), EPB has not responded to the allegation. Nor has EPB requested leave to file such a response.

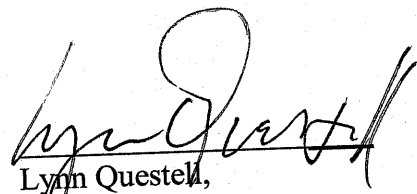
⁴³ See *Clonlara, Inc. v. Runkel*, 722 F. Supp. 1442, 1454 (E.D. Mich. 1989).

3. Summary judgment is denied as to US LEC's claim that EPB engaged in discrimination and cross-subsidization with regard to access to facilities.

4. US LEC's allegation that EPB telecommunications failed to file its internal audit reports with the TRA is dismissed.

5. EPB is hereby ordered to file annually with the TRA no later than thirty days after completion all future internal audit reports.

6. US LEC's claim that EPB violated Tenn. Code Ann. § 65-4-124 shall be held in abeyance pending the issuance of the Triennial Review Order by the FCC.



Lynn Questel,
Hearing Officer